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No. 87-734

In the Supreme Court of the United States

OCTOBER TERM 1987

STEVEN KAY, et al.,

Petitioners,

v.

DAVID DOUGLAS SCHOOL DISTRICT No. 40, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTION PRESENTED

Respondent does not agree with the statement of the question presented by Petitioner. The question, more precisely stated, is: When there existed an independent and adequate state law basis for attorney fees, whether the Oregon Supreme Court was nonetheless obliged to uphold an award of attorney fees under 43 USC § 1988, when the underlying judgment in Petitioner's favor was subsequently held to have been invalid at the time rendered, because of the failure of Petitioners to seek a timely written order or to seek relief against future activity by Respondents.

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Brief in Opposition to Petition for a Writ of Certiorari To the Supreme Court of the State of Oregon

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Respondents David Douglas School District No. 40 et al. (hereinafter "Respondents") respectfully pray that the court deny Petitioner's

request for a Writ of Certiorari to review the opinion of the Oregon Supreme Court.

OPINIONS BELOW

Respondents adopt the opinions below as set forth by Petitioner as accurate.

JURISDICTIONAL STATEMENT

Respondents adopt the statement of jurisdiction as set forth by the Petitioner as accurate.

STATUTE INVOLVED

Respondents adopt the statement of the statute involved as set forth by Petitioner as accurate.

STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case, with the following summary and clarifications.

Petitioner brought this suit to enjoin the inclusion of an opening invocation at the 1984 commencement of David Douglas High School, a public high school in Portland, Oregon.

Petitioners, in their Complaint, sought no permanent declaratory or injunctive relief as to <u>future</u> commencements.

In the opinion of the Oregon Supreme Court, the "relief requested" was <u>not</u> granted, because the trial court did not render a judgment until after the commencement exercises had been held. The trial court's verbal expression of its opinion in petitioner's favor at the hearing on the merits several days before the commencement exercises did not constitute a valid judicial order. Thus,

Petitioner's statement that they "obtain(ed) all the relief that they (sought)" is not accurate.

REASONS FOR DENYING THE WRIT

The question presented by the Petition for Certiorari is perhaps mildly interesting from a theoretical standpoint, but of little practical or continuing importance. The question is whether the Oregon Supreme Court was obliged to uphold an award of attorney fees under 43 USC § 1988 where the underlying judgment in Petitioner's favor was subsequently held to have been invalid at the time rendered, because of the failure of Petitioners to seek, and the trial court to grant, a written order based upon the court's expression of its opinion that Petitioners were correct on

the merits. The issue presented thus arises literally by accident, as the result of two litigation errors by Petitioners: The first in failing to submit a written order to the trial judge in a timely fashion, thereby rendering the judge's opinion of no force and validity under the Oregon Rules of Civil Procedure. Secondly, in not seeking any form of permanent or prospective relief against future commencements, such that the judge's Order would have had prospective validity.

The combination of these errors is unlikely to be repeated in Oregon courts. This case, therefore, presents an issue to this Court that is at best unusual, fact-bound and idiosyncratic. This Court's review is not appropriate.

Petitioner's assertions of conflict between the decisions of the Oregon Supreme Court and decisions of this Court and lower federal courts are specious. Contrary to Petitioner's assertions, they simply were not "prevailing parties" in a 42 USC § 1983 action. Their lawsuit did not induce Respondent's to settle or voluntarily to alter their conduct. Any changed conduct was solely the result of a good-faith attempt to comply with what Respondents perceived to be a court order.[1] This compliance was involuntary, and

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[1] Respondents complied with the judge's opinion, notwithstanding the failure of Petitioners to obtain a Judgment and Order. Under these circumstances, there was little else that Respondents believed that they could do. To hold the commencement invocation would have been to risk contempt proceedings at the very least.

Respondents twice appealed. Though Respondents did not succeed in obtaining a reversal of the court's Order, they did succeed in having that Order vacated. Petitioners cannot contend that Respondents would have complied with the judge's opinion, "voluntarily," even if they had been aware of its invalidity. In short, Petitioners obtained redress if at all, only through a judicial decree. If the decree was legally invalid, Petitioners obtained no redress from their lawsuit. C.f., Hewitt v. Helms, _____ US _____, 107 S. Ct. 2672, 2676 (1987).

Petitioners also failed to point out that they had available to them independent and adequate grounds under Oregon State Law by which any of the

three Oregon Courts could have awarded attorney fees. See, Deras v. Myers, 272 Or 47, 535 P2d 541 (1975). Neither the Oregon Court of Appeals nor the Oregon Supreme Court saw fit to award fees under the available State precedent. For this Court to award attorney fees under 43 USC § 1988, then, when there existed an alternative State law remedy, is simply inappropriate.

The more interesting issue--whether a prayer of invocation at a public high school commencement ceremony violated the Establishment Clause of the First Amendment or Article 1, Sections 2, 3 or 5 of the Oregon Constitution--is not before this Court. Petitioners do not challenge the correctness of the Oregon Supreme Court's ruling that no

justiciable controversy existed at the time the trial court granted its order, or that the trial court's previous opinion was thereby rendered devoid of legal force. Given this concession, it is plain that the Oregon Supreme Court did not err in refusing to award attorneys' fees to a "prevailing party" in a nonjusticiable lawsuit.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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December 1, 1987